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[illegible]

[illegible] OF MANDAMUS.

[illegible] STATES.

[illegible] PETITIONERS.

[illegible] TO THE JUDGES OF [illegible]

[illegible]

[illegible]

# SUPREME COURT OF THE UNITED STATES.

## No. 11.—Original.

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## EX PARTE MARK HOWARD ET AL., PETITIONERS.

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PETITION AND MOTION FOR A WRIT OF MANDAMUS TO THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF IOWA.

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1 Supreme Court of the United States.—Dec. term, 1869.

EX PARTE MARK HOWARD & OTHERS.

To the judges of the circuit court of the United States for the district of Iowa:

You will please take notice that Mark Howard and others will, on the Friday after the first Monday in December, 1869, or as soon thereafter as counsel can be heard, apply by motion to the Supreme Court of the United States, at Washington, for a writ of mandamus or procedendo to the circuit court of the United States for the district of Iowa, commanding them to forthwith execute the decree of the said circuit court in the cause of Mark Howard et als. against the City of Davenport et als., rendered at the May term, 1868, of said circuit court, & affirmed by the Supreme Court of the United States at the December term, 1868, or to execute the said decree by distributing all the funds ordered to be distributed among the plaintiffs, except sufficient to cover the claims of Foster et als., at the May term, 1869; & to save all delay in said application, a copy of the petition for said writ
2 is respectfully furnished to you, that you may answer the same in the first instance, or correct the statement of facts now furnished, and to any corrections you may suggest the applicants will assent.

MARK HOWARD ET ALS.,
By ROGERS & GRANT, *Sol'rs.*

DUBUQUE, IOWA, *November 23d*, 1869.

At the request of the counsel for the relators, I acknowledge service of the notice and statement of facts on which this application is made, this 23d Nov., 1869, and say that I have no objection to a decis-
3 ion by the Supreme Court "so far as I am personally concerned, without further notice or rule to show cause." The record is not before me so as to enable me to speak with exact accuracy as to facts, dates, and figures. This record, as I am informed by the counsel for the creditors in the consolidated bill, will be in the Supreme Court before this application can possibly be presented. I do not, therefore, feel authorized to make any admission as to the facts, which might affect the interest of those parties, who, as I am advised, intend to resist this application in the Supreme Court.

J. M. LOVE, *District Judge.*
SAM. A. MILLER, *Judge.*

4 (Indorsed:) Ex parte Mark Howard & others. Notice of application for mandamus, & acceptance of service by Hon. J. M. Love. Grant & Rogers for defendants.

Filed 9th December, 1869.

(Indorsed:) Supreme Court U. S. 1869, December term. Original, No. 11. Ex parte Mark Howard et al., petitioners. Motion for mandamus, &c. Filed 9th December, 1869.

DEC. 20.—Alternative mandamus. Returnable, 1st Monday of February, 1869. Clerk enter.

S. P. CHASE, *C. J.*

5 *Mandamus.*

Supreme Court of the United States—Dec'r term, 1869.

EX PARTE MARK HOWARD & OTHERS.

James Grant, being duly sworn, states on oath that due notice of this application has been made on the judges of the court below, as will appear by the acceptance of notice by Justice Love, & the statement of Justice Miller to the court; that between the 15 and 20 of November last, notice of this application was given to Hon. J. F. Withrow, who appeared as counsel for the adverse claimants, Foster, Bardwell, McComb, & McCollum; that Mr. Withrow, by letter, requested me to notify Mr. Sam'l W. Fuller, of Chicago, who had appeared as counsel for McCollum, & who, Mr. Withrow stated, would attend to the cause here. On the 19 of November I notified Mr. Fuller, and he returned me for answer the letter which is hereto attached.

JAMES GRANT.

Sworn to in open court this 10 day of D'c'r, 1869.
D. W. MIDDLETON, *C. S. C. U. S.*

6 (Indorsed:) Sup. C't U. S. 1869, Dec. term. Original, No. 11. Ex parte Howard & al. Affidavit of service of notice.

Filed 10 December, 1869.

7 Supreme Court of the United States.—December term, 1869.

EX PARTE MARK HOWARD ET ALS.

Now come Mark Howard, John Weber, Joseph Young, Clark Durant, Chas. W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet L. Conte, Joseph W. Clark, Volkert P. Dow, Christopher Y. Lansing, Margaret S. Nesbit, and Jared F. Harrison, George W. Stanton, jr., J. Elliott, Blakely Wilson, and the Mississippi and Missouri Railroad Company, by Grant, their attorney, and gives this court to be informed that on the 9th day of July, 1866, the said Mark Howard and John Weber filed their bill in equity in the circuit court of the United States for the district of Iowa, alleging that they had severally recovered judgments against the City of Davenport and the Mississippi and Missouri Railroad Company for the sums of $4,404 10 and $10,002 59, for interest on certain bonds executed by the City of Davenport to aid in the construction of the Mississippi and Missouri railroad; which bonds were guaranteed by the Mississippi and Missouri Railroad Company, and suit was commenced against the City of Davenport, the Mississippi and Missouri Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, the Chicago and Rock Island, and the Chicago, Rock Island and Pacific Railroad Company; and afterwards such proceedings were had that Joseph Young, Clark Durant, Chas. W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey D. Tracy, Harriet L. Conte, Joseph Clark, Volkert P. Dow, Margaret S. Nesbit, and Jared F. Harrison, holders and claimants of certain other bonds, ex-
8 ecuted by Scott County, Muscatine City and County, Johnson County, and Iowa City, which were guaranteed by said Mississippi and Missouri Railroad Company, were allowed to, and did, join with said

Howard and Weber in the prosecution of said suit. And the said plaintiffs alleged in substance, that at a meeting of the stock and bondholders of the Mississippi and Missouri Railroad Company, held in New York on the 20th of October, 1865, it was resolved to sell the Mississippi and Missouri railroad, its franchises, and all its real and personal property, to the Chicago and Rock Island Railroad Company for the sum of five and a half millions of dollars, provided the same was distributed among the mortgage bondholders and stockholders of said Mississippi and Missouri Railroad Company according to the following scale:

| | |
|---|---|
| 1st mortgage Eastern divis., par & interest to 1st July, 1865. | $1,256,490 |
| 2d mortgage " $400,000, at 80 | 320,000 |
| Oskaloosa division, 665,939, at 62½ | 416,212 |
| Land grant division bonds, 3,878,550, at 70 | 2,710,635 |
| 2d construction mortgage bonds, 693,764, at 30 | 208,129 |
| Capital stock, 3,452,500, at 16 | 552,400 |
| Expenses foreclosure | 32,194 |
| | $5,500,000 |

And George W. Stanton, jr., John Elliott, and Blakely Wilson were appointed a committee or trustees, for the stock and bondholders, to arrange the terms and manner of sale, and select some trust company to receive the bonds and stock of the assenting parties, and give them certificates of what they were entitled to receive. That on the 1st of November, 1865, the said Mississippi and Missouri Railroad Company and the Chicago and Rock Island Railroad Company entered into a contract in writing to carry out the sale of the former company's road, according to the resolutions of the 20th of October, 1865, to the Chicago and Rock Island Railroad Company; by which agreement the Mississippi and Missouri railroad corporation were to cause the outstanding mortgages on its property to be foreclosed, and the said property to be sold under the foreclosure decree so as to convey a clear title to such
9 corporation in Iowa, as the Chicago and Rock Island Railroad Company might designate, and the five and a half millions purchase-money were to be paid in bonds of said company, guaranteed by the Chicago and Rock Island Railroad Company, or a consolidated company made of the two. That the mortgages were foreclosed and a decree rendered in May, 1866, and the whole property was sold, under said decree, in separate parcels, on 9th July, 1866, to the Chicago, Rock Island and Pacific Railroad Company, for sums amounting in the aggregate to $2,100,000, and said company was consolidated with the Chicago and Rock Island railroad, and proceeded to execute said contract of 1st November, 1865. The plaintiffs, Howard et als., claimed that the said Mississippi and Missouri Railroad Company were insolvent, and before the sum of $552,000, set apart by the terms of the sale, could be divided among the stockholders, it should be divided among them, Howard and others, as holders of the said guaranteed bonds and judgments thereon. The said Mississippi and Missouri Railroad Company, and the trustees of the stock and bondholders, who assented to said sale, Stanton, Elliott, and Wilson, the Chicago and Rock Island railroad, and the Chicago, Rock Island and Pacific railroad, the new company created in Iowa, and consolidated with the Chicago and Rock Island railroad, were made parties defendant. The trustees, Stanton, Elliott, and Wilson, answered and made defence. The Chicago, Rock Island and Pacific Railroad Com-

pany answered, alleging that they had become agents to distribute the fund, and made no defence, and demanded to be protected by the decree of the court. Such proceedings were afterwards had that, at the May term (1868) of the said circuit court, a decree was rendered, that said plaintiffs were general creditors of said Mississippi and Missouri Railroad Company, and their claims, amounting to $832,032 38, were to be paid pro rata out of the $532,000, which was to be divided among the assenting stockholders, and the stockholders or their agents were subrogated to the creditors' rights on the guaranteed bonds. From this decree an appeal was taken by defendants and duly prosecuted in this court at the December term, 1868, and the decree of the said circuit
10 court was affirmed; and a mandate issued from this court to the Iowa circuit court, commanding the said court to execute said decree so affirmed; all of which, by reference to the record and proceedings of this court in the said cause, number 319, of the said December term, 1868, will more fully appear. And the said relators give this court further to understand and be informed, that pending said appeal to this court, and prior to the determination thereof, and the fund in controversy having been paid over to the receiver, in said decree mentioned in pursuance of said decree, and being in his hands, as appears by this report, on file in the cause, at the October term, 1868, of said circuit court, one Frederic A. Foster filed his petition in said court, entitled in the said cause, claiming to be the holder of certain of the bonds of the said Mississippi and Missouri Railroad Company to the amount of $10,000 and accrued interest, being part of the bonds secured by the first mortgage on the western division of the railroad of said company; and certain lands granted to it in aid of its construction, commonly known as "1st mortgage land grant bonds," which bonds had not assented to the said contract or agreement for the sale of the railroad as aforesaid, and claiming to be entitled to a lien on the said fund superior to the said Howard and others, complainants, and to have the said bonds paid in full, out of said fund, in preference to said complainants. That afterwards, to wit, at the May term, 1869, of said circuit court, said appeal having been determined, and the mandate from this court filed in said circuit court, and the complainants having moved said court to carry the decree into execution, certain other parties, to wit, John V. McCollum, J. Bardwell, and H. S. McComb, appealed for leave to file their several petitions therein; also claiming severally to be holders of certain unassented mortgage bonds of the said Mississippi and Missouri Railroad Company, and to be entitled to have the same paid out of the said fund, prior and paramount to any payment to the claimants, as directed by said decree. And thereupon at the said term last mentioned, an order was made by the said circuit court, of which a certified copy is hereunto annexed marked "A," and made part hereof. That
11 thereupon at the same term, said Foster, McCollum, Bardwell, and McComb prayed an appeal to this court from so much of said order as denied their petition for a suspension of the distribution of the whole of said fund, and as directed distribution of a part thereof; which appeal, together with the supersedeas thereon, of any distribution of said fund, was by the said court allowed, against the objection and remonstrance of said complainants, and said order of the May term, 1869, so far as it directs distribution to be made, remains in consequence wholly unexecuted. That afterwards, to wit, on the last July rule day of said circuit court, said Foster, McCollum, Bardwell, and McComb filed their consolidated cross-bill in pursuance of said order. That relators answered said cross-bill, and the same was heard at the October term, 1869, and a decree made dismissing said bill as to McCollum,

adjudging that said Foster, Bardwell, and McComb were entitled to share in the fund pro rata, on the same footing and equally with the original claimants, to wit, as general creditors of the Mississippi and Missouri Railroad Company, and not otherwise, and ascertaining the amount due to them respectively, and on which dividends should be made to them pari passu with the original complainants as follows, to wit:

| | |
|---|---|
| To said Foster the sum of | $9,898 00 |
| To said Bardwell the sum of | 6,718 00 |
| To said McComb the sum of | 993 00 |

And so far modifying the original decree as to let in said parties to participate in the benefit thereof to said extent, and no further. A copy of said decree marked "D" is hereto annexed, and made part hereof. That said Foster, Bardwell, McCollum, and McComb thereupon appealed from said decree to this court, and obtained a supersedeas thereon. That afterwards, to wit, at the said October term, your relators moved the said circuit court for a rule or order on the receiver in said cause, to proceed, notwithstanding an appeal of said Foster and others, to make distribution of the fund in his hands, under the original decree, or of so much thereof as was ordered by the court by the said order of the May term, 1869, to be distributed, which motion was by the said
12 court overruled. That by reason of said actings and doings of said circuit court, subsequent to the rendition of the original decree, affirmed by this court, relators have hitherto been and are still deprived of all benefit from said decree and prevented from enforcing the same, or obtaining payment of their said claims thereunder. That said actings and doings of the circuit court are, as relators are advised and believe, wholly contrary to, and unwarranted by, law or equity. That relators have no remedy therefor except a writ of mandamus from this court to be directed to the judges of said circuit court, commanding them to proceed to execute said decree. Wherefore they pray that such writ may issue, commanding the said judges forthwith to proceed, notwithstanding said proceedings subsequent to said original decree, to carry the same forthwith into execution, in manner and form as therein and thereby decreed; or, if the court shall be of opinion that relators are not entitled to have said decree forthwith executed, as to the whole fund in the receiver's hands, that then the writ may issue, commanding said judges to execute the same as to all of said fund, except so much as will be sufficient to satisfy the claims of said Foster, McCollum, Bardwell, and McComb, if finally allowed in full, or commanding said judges to do whatsoever, in the opinion of this court, said relators may be entitled to have done for their relief in the premises.

JAMES GRANT,
JOHN N. ROGERS,
*Attorneys for Informant.*

Sworn to by Jno. Tuber before notary.

*Exhibit "A."*

Be it remembered, that among the records and proceedings of the circuit court of the United States for the district of Iowa, at the May term thereof, 1869, is the following, to wit:

MARK HOWARD
*vs.*
THE CITY OF DAVENPORT ET ALS. } No. 69 eq.

This cause coming on to be heard, on motion of the complainants to

13 distribute a portion of the funds in the hands of the receiver heretofore appointed in this cause, the motion of George W. McCollum for leave to file his petition herein, the motion of Solomon Bardwell for leave to file his petition herein, the motion of H. S. McComb for leave to file his petition herein, and the petion of Frederick S. Foster, heretofore filed herein, after argument of counsel for the respective parties named, and on inspection of the record and said several motions and petitions, it is ordered, adjudged, and decreed—

First. That the said George W. McCollum, Solomon Bardwell, and H. S. McComb have leave to file their several petitions, and that the same be considered as filed prior to the entry of this order, and that the petitioners, the said Foster, Bardwell, McCollum, and McComb, have until the July rule day, to file a bill consolidating these claims, and setting up more specifically their several claims presented in their several petitions now on file, but no other or further claims, and that they serve a copy of their said bill on James Grant, for the use of complainants; that complainants and intervenors demur, plead, or answer to said bill by the rule day in August following; and that thereafter the parties proceed as in other causes in chancery.

Second. That the prayer of the petitioners above named, for an order restraining the receiver from distributing any of the fund in his hands, until their rights to share in the distribution thereof is determined, is refused and denied as to all of said fund, except the sum of two hundred thousand dollars.

And the motion of complaint for an order directing the receiver to distribute said fund is sustained as to all except said two hundred thousand dollars; and the receiver is ordered to proceed forwith to proceed to make distribution of all of said fund except the said sum of two hundred thousand dollars, according to the directions given in the decree herein to the several parties to whom said decree directs such distribution; he will sell and convert into cash, as provided in said decree, all of the bonds of the Chicago, Rock Island and Pacific Railroad Company in his hands, except the sum of two hundred thousand dollars.

14 Provided, that such of said parties, to whom the distribution is to be made as they shall so elect, shall have the right to receive the amounts coming to them respectively, or any part thereof, in said bonds in specie, at a price to be agreed upon between them and the receiver, and approved by the judge of this court, not less than the current market price at the Stock Exchange in New York, at date of distribution; and the receiver shall deliver the bonds to them in payment at such rate accordingly.

And it is further ordered (the defendants Wilson and Elliott having filed there written consent thereto as provided by said cree) that there be paid to said parties entitled thereto in making such distribution (so far as said amount to be distributed will suffice therefor) of their claims not yet matured, as well of those already matured, on the terms and conditions and in the order of priority of payment provided by said decree.

And therefore the petitioners, Frederick A. Foster, Geo. W. McCollum, Solomon Bardwell, H. S. McComb, and each of them, pray an appeal to the Supreme Court of the United States from the order and decree contained in the second paragraph, hereinbefore set out, being order denying and refusing the relief prayed in their petitions, and in the petition of each of them; that the receiver herein be directed to refrain from distributing the fund in his hands, and sustaining complainants' and intervenors' motion for an order distributing a portion of the fund in

the hands of the receiver, directing and ordering a distribution of a part thereof; which appeals are allowed to them, and to each of them, upon their filing a bond with sureties in the penal sum of five hundred dollars, as provided by law, for the costs of the appeal. Provided, that in order to supersede and stay execution of said orders and decrees pending the appeal, they shall give bond with sureties conditioned and approved as provided by law in the penal sum of nine hundred thousand dollars.

(Signed) J. M. LOVE, *Judge.*

"*A.*"

15

And afterwards, to wit, on the 2d day of June, A. D. 1869, the folfollowing was entered of record, to wit:

MARK HOWARD
*vs.*
THE CITY OF DAVENPORT ET ALS.

Now comes John W. McCollum, J. Bardwell, H. S. McComb, and Frederic A. Foster, petitioners in the above-entitled cause, and in open court present their appeal and supersedeas bonds, in compliance with the requirements and the order allowing this appeal from the decree hereinbefore entered, on the hearing of the several petitions filed herein, and move the court to approve the same; and the court having inspected said bond, as to its sufficiency in form and security, orders that the said bond be filed, and is approved as to the form thereof and the sufficiency of the sureties for the penalty thereof.

(Signed) J. M. LOVE, *Judge.*

Circuit court of the United States for the district of Iowa.

I, George B. Corkhill, clerk of the circuit court of the United States for the district of Iowa, do hereby certify that the foregoing is a full, true, and complete copy of the decree and order of court in the case Mark Howard vs. the City of Davenport et als., as the same appears of record and now in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at office in Des Moines, this 11th day of June, 1869.

[L. S.] GEORGE B. CORKHILL, *Clerk.*

16 *Exhibit B.—Consolidated bill.*

In the circuit court of the United States, district of Iowa.

MARK HOWARD AND JOHN WEBBER
*v.*
THE CITY OF DAVENPORT, THE MISSISSIPPI and Missouri River Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, the Chicago and Rock Island Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, defendants.

To the judges of the circuit court of the United States for the district of Iowa:

Frederick A. Foster, a citizen of the State of New York; John V.

McCullom, a citizen of the State of Pennsylvania; J. Bardwell, a citizen of the State of Massachusetts; and H. S. McComb, a citizen of the State of Delaware, pursuant to and in accordance with the order of this court, made in the above-entitled cause, on the 26th day of May, A. D. 1869, upon their several petitions, hereinbefore filed, bring this their bill against Mark Howard and John Webber, complainants, the City of Davenport, the Mississippi and Missouri Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, the Chicago and Rock Island Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, defendants; and Joseph Young, Clark Durant, Thomas W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsy Tracy, Harriet Le Conte, Margaret Nesbit, Joseph W. Clark, Volkert P. Douw, Christopher Y. Lansing, and Jared F. Harrison, intervenors in said cause; and thereupon your orators complain and say—

That the Mississippi and Missouri Railroad Company, one of the defendants in the above-entitled cause, was, prior to the execution of the several bonds and mortgages hereinafter mentioned, and on the
17 22d day of December, A. D. 1852, organized as a corporate body under the laws of the State of Iowa, for the purpose of constructing and operating a railroad in said State.

That pursuant to said purpose, and in accordance with its articles of incorporation and the laws of said State, the said railroad company did execute and sell in the market, to divers persons unknown to your orators, its bonds known as the construction bonds of said company; that said bonds were each for the sum of one thousand dollars, and had coupons appended for interest thereon at the rate of seven per cent. per annum; that they bore date the 8th of May, 1857; that the principal thereof was payable on the 8th day of May, 1877, to Clark Durant, or bearer; that the interest coupons thereto appended were payable at the office of the company at the city of New York, semi-annually, on the 15th days of May and November in each year, all of which will more fully appear by said bonds and coupons, a copy of one of each of which is appended to this bill and marked Exhibit A, the copy of said bond being a copy of all of the bonds of said series with the exceptions of the number thereof, and the copy of said coupon being a copy of all other coupons appended to said bonds, with the exceptions of the numbers and the date of maturity; that reference is made to said copies with the same purpose and effect as if the same were incorporated in the body hereof. That to secure the payment of said bonds according to the tenor thereof, the amount to be issued being limited to the sum of seven millions of dollars, the said Mississippi and Missouri Railroad Company did execute and deliver its mortgage bearing said date and conveying to Thomas E. Walker and Curtis B. Raymond, trustees, all and singular the roadway, stations, depot lands, and other lands appurtenant to said railway then owned or thereafter to be acquired by said company, constituting and belonging to the railroad of said company, extending from Iowa City, in the State of Iowa, to Council Bluffs, in said State, being a part of the railway of said company, extending from the city of Davenport on the Mississippi River, to said city of Council Bluffs, on the Missouri River, and the appurtenances thereof; also all the right, title, and interest of said company to all the public lands of the United States granted by the act of Congress of May 15th, 1856, to the State of Iowa, and by the act of the legislature of the State of Iowa of July 14th, 1856, to the said railroad company; that said conveyance was in trust for the benefit of the holders of bonds issued by said company as hereinbefore

alleged and set forth; that by the terms of said mortgage the trustees named therein were empowered, upon default in making payment of the principal or interest of said bonds, or of either of them, to take possession of the railroad of said company, with its equipments and appurtenances, and of all the lands conveyed, and to use or sell the same, or any part thereof, and apply the proceeds to the payment of said bonds, as will with greater certainty appear by the copy of said mortgage
18 appended to the cross-bill of Thomas E. Walker and Franklin Haven, in a certain cause heretofore pending, and now of record in this court, wherein Thomas C. Durant, Jacob S. Wetmore, and Robert B. Mintern, jr., were complainants, and the Mississippi and Missouri Railroad Company and others were defendants, to which reference is hereby made with the same purpose and effect as if the same were incorporated in the body hereof.

That on the 10th day of December, 1861, the said railroad company executed and sold in the market, to divers persons unknown to your orators, bonds of a series known and described as second mortgage bonds, a part of which were for the sum of one thousand dollars each, and a part for the sum of five hundred dollars each; that to each of said bonds were appended forty coupons for the interest thereon, at the rate of seven per cent. per annum, which coupons were payable at the office of the company, in the city of New York, on the first days of January and July in each year, all of which will with more certainty appear from the copies, one of each of said bonds and coupons hereto appended, marked Exhibit B, to which reference is hereby made, with the same purpose and effect as if the same was incorporated in the body of this bill. That the said exhibit sets out correctly, with the exceptions of the number, the contents of each bond of said series, and the copy of the coupons thereon sets forth correctly the contents of each coupon, with the exceptions of the number and the date of maturity thereof; that on said day the said railroad company, for the purpose of securing the payment of said bonds, executed another mortgage, conveying to Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn the railroad of said company, with its equipments and appurtenances, from the city of Davenport to the city of Council Bluffs and to Washington, in the State of Iowa, and all the right, title, and interest which the said company then had, or should thereafter acquire, in and to all public lands of the United States granted by the act of Congress aforesaid, to the State of Iowa, and by the State of Iowa, (by the act of the general assembly aforesaid,) to the said railroad company, which conveyance was subject to the mortgages then existing upon the different divisions of said railroad, and the appurtenances thereunto belonging; that the said mortgage empowered the said trustees upon default in the payment of the principal or interest of said bonds, or of either of them, to take possession of said railroad, its equipments and appurtenances, and sell or use the same or any part thereof, and apply the proceeds in the payment of said bonds, all of which will appear with greater certainty from said mortgage, a copy of which is appended to the amended bill of the complainants in the case heretofore pending, and now of record in this court, described hereinbefore more particularly, to which your orators crave leave to refer with the same purpose and effect as if the same were incorporated in the body hereof.

19 That on the 8th day of May, 1863, the said Mississippi and Missouri Railroad Company executed and delivered to divers holders of matured coupons on its first mortgage construction bonds, bonds of a series known and described as income bonds; that said

bonds were for the sum of five hundred dollars each, with interest at the rate of seven per cent. per annum, payable semi-annually at the office of said company in the city of New York, on the eighth days of May and November in each year, as will more fully appear by a copy of one of said bonds, and of one of the coupons thereto appended, attached hereto as Exhibit C, to which reference is hereby made with the same purpose and effect as if incorporated in the body hereof; that said bonds are secured by the mortgage executed to secure the payment of the said construction bonds.

That the said Curtis B. Raymond having declined to act as trustee under the mortgage executed to secure the payment of said construction bonds, as aforesaid, one Franklin Haven was, in accordance with the provisions of said mortgage, appointed a trustee to act in his place.

That on the 5th of February, A. D. 1866, Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn filed their bill in this court against the said Mississippi and Missouri Railroad Company, Edward W. Dunham, Thomas E. Walker, Franklin Haven, Mark Howard, and John Webber, to foreclose the mortgage hereinbefore described as having been executed by the said Mississippi and Missouri Railroad Company, to the said Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn, jr., to secure the payment of the said second mortgage bonds, and praying, among other things, a sale of the property therein described, and an application of the proceeds arising therefrom to the payment of the bonds by said mortgage secured; that thereafter the said Thomas E. Walker and Franklin Haven filed in said cause their cross-bill, praying a foreclosure of the mortgage hereinbefore described in which they were trustees, that the property therein conveyed to them as trustees be sold, and the proceeds applied in the payment of the bonds secured by said mortgage; that upon the issues joined in said cause, a hearing was had on the 8th day of May, 1866, wherein it was adjudged and decreed that there was due to the said Thomas C. Durant, Jacob S. Wetmore, and Robert B. Minturn, jr., the sum of seven hundred and forty-five thousand dollars and two cents, being the amount due and unpaid on the bonds secured by the mortgage executed to them as trustees, as hereinbefore recited; that there was due to the said Thomas E. Walker and Franklin Haven the sum of four millions two hundred and twenty-nine thousand nine hundred and eighty-two dollars and seventy-one cents, being the amount due and unpaid on the bonds secured by the mortgage executed to them as trustees as hereinbefore recited; that in default of payment of said sums within the time named in said decree, the property described in said mortgages should be sold and the proceeds applied to the payment of said bonds and the over due coupons thereto attached.

That pursuant to said decree, and in accordance with the terms thereof, said mortgaged property was sold on the 9th day of July, A. D. 1866, by a special master appointed by this court; that the Chicago, Rock Island and Pacific Railroad Company, a corporation which had been organized under and by virtue of the laws of the State of Iowa, for the purpose of purchasing said property and completing and operating said railroad, became the purchaser; that the aggregate amount bid at said sale for the different parcels of said mortgaged property was the sum of two millions one hundred thousand dollars, but the actual amount agreed to be paid for said property was the sum of five millions five hundred thousand dollars; that the amount bid was nominal merely, the real agreement and understanding by and between the parties being that the purchaser should pay for the title

acquired thereby the said sum of five millions five hundred thousand dollars; that the said sum of two millions one hundred thousand dollars, bid at said sale, was not paid, but the trustees, in whose favor the decree of foreclosure was entered, gave a receipt to the officer conducting the sale for the amount without actual payment, the same being treated as part and parcel of the said sum of five millions five hundred thousand dollars which it had been agreed should be paid for said property; that the said trustees have never had in their own hands any of the moneys arising from said sale, but that all disbursements which have been made to the holders of bonds entitled thereto have been made by the Chicago, Rock Island and Pacific Railroad Company, and applied on the said sum of five millions five hundred thousand dollars agreed as aforesaid to be paid for said mortgaged property.

That on or about the 20th day of October, A. D. 1865, and prior to said foreclosure and sale, an arrangement was entered into by and between some of the holders of bonds of each of the series which had been issued by the said Mississippi and Missouri Railroad Company and some of the stockholders of the said railroad company, in which it was agreed that a portion of the proceeds to be realized from the sale of said property, as above alleged, and which of right was applicable in the payment of the bonds and matured coupons, should be withheld from such application, and be improperly applied to the payment to the stockholders of said railroad company, sixteen per cent. of the par amount of the stock in said company, while the holders of the several series of bonds to which the bonds now held by your orators belong, should receive less than the par amount then due and unpaid thereon, according to a scale at the time agreed upon; that your orators nor either of them were parties to such agreement; that they nor either of them have ever assented to or approved of the same, and that the several bonds, coupons, and scrip which they severally hold, nor any part thereof, are in any manner, by the agreements of the holders
21 thereof, or otherwise, subject to the same; that many of the holders of said bonds of said several series have accepted of the sums provided for the payment of the same by the said agreement and scale; that neither of your orators nor any one holding the bonds and coupons and scrip which they now hold have accepted said sum in payment of the same; that they have never relinquished or in any manner waived their right to demand payment of the same in full; that pursuant to said agreements a portion of the proceeds of said sale, amounting to nearly five hundred and fifty thousand dollars, and now amounting, with the accumulations of interest, to over six hundred thousand dollars, has been set apart to the payment of the said sixteen per cent. to the holders of the capital stock of said railway company.

That the complainants in this cause being general creditors of the said railroad company, filed their bill and amended bill in this cause praying the application of said fund, then in the hands of the defendant, the Chicago, Rock Island and Pacific Railroad Company, to the satisfaction of their several claims against the said Mississippi and Missouri Railroad Company; that subsequently thereto the said intervenors, who are also general creditors of said railroad company, filed their petitions in said cause, praying that they be allowed to become co-complainants in said bill, and be allowed to prove the amount of the several claims with the complainants, and to share pro rata in said fund, or the proceeds thereof, upon the same terms as those already joined as com-

plainants; that upon issues joined by the pleadings filed in said cause, this court has entered a decrees by which it is ordered that the defendants, the Chicago, Rock Island and Pacific Railroad Company, (a corporation organized by the consolidation, in accordance with the laws of the States of Illinois and Iowa, of the Chicago, Rock Island, and Pacific Railroad Company, of Iowa, above mentioned, and of the Chicago and Rock Island Company, of Illinois,) and George W. Stanton, jr., John Elliott and Blakely Wilson pay to one B. F. Allen, as receiver at this court, said fund to be distributed to the said complainants and intervenors, in payment, as far as the same is adequate, of the several demands which they hold against said Mississippi and Missouri Railroad Company, all of which will more fully appear by the record of the pleadings and decree in this court, to which, for greater certainty as to the allegations of said pleadings, and the orders and adjudications in said decree, your orators crave leave to refer; that pursuant to said decree the said Chicago, Rock Island and Pacific Railroad Company paid said fund to said receiver, and it is now held by him under the orders and instructions of the court; that said fund is a part of the proceeds of said mortgage sale.

That your orator Frederick A. Foster represents that he is the owner and holder of ten of the construction bonds above described, being the bonds numbered 60, 61, 62, 63, 64, 65, 622, 623, 625, 1031, with the coupons attached to each bond numbered from 16 to 40, inclusive;
22 that there is now due to him from the Mississippi and Missouri Railroad Company the principal of said bonds, and the matured coupons on each; that the principal of said bonds, and said last-mentioned coupons, remain wholly unpaid; that neither himself nor any prior owner and holder of said bonds and coupons has waived payment of the full amount of said bonds and matured coupons; that he has never made or assented to, neither has any one who has hitherto owned and held said bonds and coupons made or assented to any arrangement or agreement that said bonds or coupons or any of them should be satisfied or discharged as valid and binding obligations of said railroad company by the payment of any less sum than the full amount of principal and interest matured thereon.

And your orator John V. McCullom represents that he is the owner and holder of the construction bonds of said Mississippi and Missouri Railroad Company, numbered 421, 423, 592, 778, 1453, 1905, 2531, 2698 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, and 2747, each thereof being for the sum of one thousand dollars, with the exception of the bonds numbered 592 and 778, which are each for the sum of five hundred dollars; that he also owns and holds the interest coupons appended to said bonds numbered from to 40, inclusive; that he is also the owner and holder of the income bonds of said company hereinbefore described, numbered 148, 152, 153, 154, 155, 156, 157, 200, 235, 236, 237, 238, 240, 252, and those numbering from 159 to 198, both inclusive, each thereof being for the sum of one thousand dollars, and that he owns and holds the interest coupons thereto appended, numbered from to 40, inclusive; that the principal of said bonds and the matured coupons on each are now due and unpaid; that he is also the owner and holder of certain coupons which were attached to other second mortgage construction bonds of said Mississippi and Missouri Railroad Company, which are all past due and wholly unpaid; that the said coupons, so owned by him, and the said bonds to which they were attached, and the number of each variety are as follows, viz:

| Number of coupons owned. | Their number. | Number of the bonds from which they were detached. |
|---|---|---|
| 50 | 1 | 2658 to 2707, both inclusive. |
| 38 | 2 | 2008 " 2045 " " |
| 55 | 3 | 2946 " 3000 " " |
| 36 | 2 | 3001 " 3036 " " |
| 64 | 4 | 3037 " 3100 " " |
| 15 | 2 | 3101 " 3115 " " |
| 96 | 5 | 3116 " 3211 " " |
| 97 | 6 | 3212 " 3290 " " |
| 80 | 7 | 3291 " 3370 " " |
| 7 | 2 | 3371 " 3377 " " |
| 23 | 8 | 3378 " 3400 " " |
| 57 | 9 | 3401 " 3457 " " |
| 50 | 10 | 4051 " 4100 " " |
| Number of coupons owned. | Their number. | Number of the bonds from which they were detached. |
| 23 50 | 11 | 4101 " 4150 " " |
| 50 | 12 | 4151 " 4200 " " |
| 50 | 13 | 4201 " 4250 " " |
| 800 | | |

That no part of said bonds and coupons have been paid; that neither he nor any other person or corporation in his behalf has ever made, assented, or agreed to the arrangement and agreement hereinbefore recited for the payment of said bonds and coupons by the payment of a less sum than that due on the face thereof; and that he is now entitled to be paid the full amount stipulated to be paid on the face of the said bonds and matured coupons.

And your orator J. Bardwell represents that he is the owner and holder of the construction bonds of said company numbered as follows: 781, 782, 783, 784, 785, with the coupons attached numbered from 16 to 40, inclusive; also of the income bonds issued by said company, the bond for the sum of five hundred dollars numbered as follows, 101½, with the coupons thereto attached; also of the second mortgage construction bonds of said company, the bond for the sum of five hundred dollars, numbered as follows, 154, with the interest coupons attached, numbered from 7 to 40, inclusive; that the principal of all of said bonds and the matured coupons thereto attached are now due and unpaid; and he is now entitled to be paid from the funds of said company the full amount thereof; that he has not entered into any arrangement or agreement for the payment of said bonds and coupons by the payment of a less sum than the amount stipulated to be paid thereon by the face thereof; that he has not assented, neither has any other person or corporation assented for him, to the arrangement hereinbefore recited for the payment of said bonds by a scale providing for their payment at less than par.

Your orator H. S. McComb represents that he is the owner of the second mortgage bond numbered 750, issued by said company for the sum of five hundred dollars, as a part of the series known by that designation and hereinbefore described; also of the coupons thereto appended and numbered from 5 to 40, inclusive; that no part of either the principal or of said coupons has been paid and the full amount of said bonds and the matured coupons are now part due and unpaid. That on the first day of October, 1864, the said railroad company entered into an agreement with such holders of its construction bonds as should assent thereto to issue scrip for the matured interest on said first mortgage construction bonds; that said scrip was convertible into second mortgage construction bonds of said company, when presented in sums of five hundred dollars; that there was issued by said company scrip

numbered 210, for the sum of two hundred and fifty dollars and fifty cents pursuant to and in accordance with said agreement, and that a
24 copy of said scrip is appended hereto as Exhibit D, to which reference is hereby made, with the same purpose and effect as if incorporated in the body hereof; that he is also the owner and holder of said scrip; that the same has never been paid or converted into bonds under said agreement; that he has not, neither has any one for him, entered into or approved of any arrangement or agreement for the payment of said bonds, coupons, and scrip by the payment of any sum less than the amount stipulated upon the face thereof to be paid; and he expressly alleges that he was not a party to the arrangement for scaling the bonds of said company for payment at less than par by an application of the proceeds of the sale of the mortgaged property as hereinbefore recited.

And your orators further show that by reason of the premises they are severally entitled to have their bonds, coupons, and scrip aforesaid paid out of the funds now in this court or under its control, realized from the sale of the property and franchise of said company as hereinbefore alleged; that such payment should be made to your orators before anything is paid to the complainant and intervenors in this cause, or any claims represented in this cause by the Chicago, Rock Island & Pacific Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, inasmuch as said bonds, coupons, and scrip are, as your orators are informed, advised, believe, and allege, prior to any and all of the claims represented by the complainants, intervenors, and defendants herein.

And therefore your orators severally pray that upon the final hearing hereof, your honors will order, direct, and decree that the aforesaid bonds, coupons, and scrip belonging severally to your orators shall be first paid to them, together with all arrearages of interest thereon, out of the fund under the control of this court and in the hands of B. F. Allen, receiver as aforesaid; that if the court shall find that your orators are general creditors only of the said Mississippi and Missouri Railroad Company having no lien upon said fund prior to that of the complainants and intervenors herein, that the court will order, direct, and decree that they share pro rata with said complainants and intervenors in the distribution of said fund, or of the proceeds thereof, upon the same terms and basis, and that your orators severally have such other, further, or different relief in the premises as to the court shall seem meet.

WITHROW & WRIGHT,
*Solicitors for Fred A. Foster.*
And with SCAMMON, McCAGG & FULLER,
*Solicitors for John V. McCullom.*
POLK, HUBBELL & BARCROFT,
*Solicitors for J. Bardwell.*
NOURSE & KAUFFMAN.

25 *Exhibit A.*

UNITED STATES OF AMERICA, *State of Iowa:*

No. 623.—*Mississippi and Missouri Railroad Co. construction bond*, $1,000; *secured by mortgage on land grant and railroad.—Length of road mortgaged*, 257 *miles.*

The Mississippi and Missouri Railroad Company acknowledge themselves to owe to Clark Durant, or bearer, one thousand dollars, which

sum said company promise to pay to the said Clark Durant, or to the holder hereof, at their office in the city of New York, on the eighth day of May, 1877, and also interest thereon at the rate of seven per cent. per annum, semi-annually, on the eighth day of each November and May ensuing the date hereof until said principal sum shall be paid on presentation of the annexed interest warrants at the office of the company in the city of New York.

The payment of the construction bonds is secured by a deed of trust or mortgage upon the railroad of the company and upon the lands granted to aid in its construction, as specified in said deed of trust or mortgage, and in the annexed certificate of the trustees.

But the company reserve the right to purchase this obligation at any time by agreement with the holder, or to redeem the same at the par value thereof on any of the days specified for the payment of interest, by advertising their intention to do so in two newspapers published in the city of New York, and one published in the city of London, at least twelve months previous to the day when said bonds are to be redeemed. The numbers of the bonds to be called in to be determined by lot.

In testimony whereof, the said company have hereunto caused to be affixed their corporate seal, and these presents to be subscribed by their president and treasurer, this eighth day of May, 1857.

[SEAL.] JOHN A. DIX, *President.*
M. FLAGG, *Treasurer.*

The undersigned trustees do hereby certify that the Mississippi and Missouri Railroad Company have executed to us a deed of trust, or mortgage, purporting to convey their road and equipments and all appurtenances thereto from the city of Iowa City to the city of Council Bluffs, and also all the right, title, and interest which the said company now have, or shall hereafter acquire, in and to all of the public lands of the United States, granted by act of Congress, approved May 15th, 1856, to the State of Iowa, and by the general assembly of the State of Iowa, by act approved July 14th, 1856, granted to the Mississippi and Missouri Railroad Company, as specified in said instrument, in trust for the
26 benefit of the holders of their bonds of similar tenor as the foregoing, issued and to be issued to an amount not exceeding in all seven millions of dollars, with power to take possession of said railroad, its equipments and appurtenances, and sell or use the same, or any part thereof, in case of a default in paying the interest or principal of said bonds or any of them, and with power to sell the lands so conveyed and apply the proceeds to the payment of said bonds, and that the foregoing is one of the several bonds described in and secured by said deed, and that we have caused the said deed to be recorded in the several counties through which the said road passes, and in which said lands are situated.

THOMAS E. WALKER,
F. HAVEN, *Trustees.*

(There is printed in red on the face of foregoing bond the figures $1,000.)

The Mississippi & Missouri Railroad Company will pay to the bearer at their office in the city of New York, on the eighth day of May, 1877, thirty-five dollars for interest due that day on their bond No. 623.

$35. H. PRICE, *Secretary.*

(There is printed in red on the face of foregoing coupon the figures "40.")

*Exhibit B.*

UNITED STATES OF AMERICA, *State of Iowa:*

*Mississippi and Missouri Railroad Company.*

No. 154. *Second Mortgage Construction Bond.* $1,000.

The Mississippi and Missouri Railroad Company acknowledge themselves to owe to one C. W. Durant, or bearer, one thousand dollars, which sum the said company promise to pay to the said C. W. Durant, or to the holder hereof, at their office in the city of New York, on the first day of January, 1882, and also interest thereon at the rate of seven per cent. per annum semi-annually, on the first day of each January and July ensuing the date hereof, until the said principal sum shall be paid, on presentation of the annexed interest warrants at the office of the company in the city of New York.

The payment of this bond is secured by a deed of trust, or mortgage upon the railroad of the company, and upon the lands granted to aid in its construction, as specified in said deed of trust or mortgage, and in the annexed certificate of the trustees.

27 In testimony whereof, the said company have hereunto caused to be affixed their corporate seal, and these presents to be subscribed by their president and secretary, this tenth day of December, 1861.

[SEAL.] JOHN A. DIX, *President.*
H. PRICE, *Secretary.*

The undersigned trustees do hereby certify that the Mississippi and Missouri Railroad Company have executed to us a deed of trust, or mortgage, subject to the mortgages already existing upon different divisions of said road, purporting to convey their road and equipments and all appurtenances thereto, from the city of Davenport to the city of Council Bluffs, and to Washington, in the State of Iowa, and also all the right, title, and interest which the said company now have, or shall hereafter acquire, in and to all public lands of the United States granted by acts of Congress approved May 15, 1856, to the State of Iowa, and by the general assembly of the State of Iowa, by act approved July 14, 1856, granted to the Mississippi and Missouri Railroad Company, as specified in said instrument, in trust, for the benefit of the holders of their bonds of similar tenor as the foregoing, except that part of the same are for $500 each and part are for $1,000 each, issued and to be issued to an amount not exceeding in all seven hundred thousand dollars, with power to take possession of said railroad, its equipments and appurtenances, and sell or use the same, or any part thereof, in case of a default in paying the interest or principal of said bonds, as in manner provided for in said deed of trust, or any of them, and with power to sell the lands so conveyed, and apply the proceeds to the payment of said bonds, and that the foregoing is one of the several bonds described in and secured by said deed, and that we have caused the said deed to be recorded in the several counties through which the said road passes, and in which said lands are situated.

THOMAS C. DURANT,
JACOB S. WETMORE,
*Trustees.*

The Mississippi and Missouri Railroad Company will pay the bearer

at their office in the city of New York, on the first day of January, 1882, thirty-five dollars, for interest due that day on their bond No. 154.

$35 00. H. PRICE, *Secretary.*

(Across the face of this coupon is printed the figures "40" in red.)

28 *Exhibit C.*

*The Mississippi and Missouri Railroad Company.*

STATE OF IOWA, *United States of America*:

No. 101½. *Income Bond.* $500.

Be it known that the Mississippi and Missouri Railroad Company owe to , or bearer, the sum of five hundred dollars, which sum the said company are obligated to pay on the eighth day of May, 1871, with interest on said sum of five hundred dollars at the rate of seven per cent. yearly, payable semi-annually at the office of the said company, in the city of New York, on the eighth day of May and November in each year, and the faith of the company is hereby pledged for the annual payment of the interest, and the ultimate redemption of the principal.

This bond is issued for coupons of the first mortgage construction bonds, which coupons are held by H. C. Crane, trustee, in accordance with an agreement between the holders of said bonds and this company, bearing date Octoner 1st, 1862.

In testimony whereof, the said company have hereunto caused to be affixed their corporate seal, and these presents to be subscribed by their treasurer and secretary, the eighth day of May, 1863.

[SEAL.] GEO. T. M. DAVIS, *Treasurer.*
J. S. BAKER, *Ass't Secretary.*

[U. S. revenue 20 cents, cancelled.]

The Mississippi and Missouri Railroad Company will pay the bearer seventy 50-100 dollars on the eighth day of May, 1871, at their office in the city of New York, due on that day on their bond number 102½.

J. S. BAKER, *Ass't Secretary.*

(The word "income" is printed in red across the face of said coupon.)

29 *Exhibit D.*

$252 50. *Mississippi and Missouri Railroad Company.* No. 210.

No. 13 WILLIAM STREET, *New York*, 186 .

Received from H. S. McComb coupons of the first mortgage construction bonds of this company, amounting to balance of two hundred and fifty-two and 50-100 dollars, for which this scrip is issued, convertible into the second mortgage construction bonds of this company according to the terms of agreement bearing date October 1st, 1862, whenever presented at this office in sums equal in amount to the denomination of said bonds.

Witness the signature of this company by its treasurer this 1st day of February, 1864.

GEO. T. M. DAVIS, *Treasurer.*
J. S. BAKER, *Register.*

[Twenty-five cents U. S. revenue stamp attached and cancelled.]

Indorsed: H. S. McComb.

30 *Exhibit C.—Amendment to petitioners' consolidated bill.*

In the circuit court of the United States, district of Iowa.

MARK HOWARD AND JOHN WEBBER
*vs.*
THE CITY OF DAVENPORT, THE MISSISSIPPI AND Missouri Railroad Company, the Chicago and Rock Island Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, defendants.

To the judges of the circuit court of the United States for the district of Iowa:

Your orator, John V. McCollum, for amendment to the consolidated bill hereinbefore filed by your orator, and Frederick A. Foster, J. Bardwell, and H. S. McComb, withdraws from said consolidated bill the paragraphs setting out the numbers and otherwise describing the bonds and coupons owned by your orator, and in the place of the allegations set out in said paragraphs so withdrawn, substitutes the following, to wit:

And your orator, John V. McCollum, represents that he is the owner and holder of the construction bonds of the Mississippi and Missouri Railroad Company numbered 421, 423, 592, 778, 1453, 1905, 2531, 2698, 2699, 2700, 2701, 2702, 2703, 2704, 2705, 2706, 2707, 2747, each thereof being for the sum of one thousand dollars, with the interest coupons appended to said bonds numbered from sixteen to forty, inclusive; also of the second mortgage construction bonds of said company numbered 592 and 778, each for the sum of five hundred dollars, with the interest coupons appended thereto numbered from seven to forty, inclusive; also of the income bonds of said company numbered 148, 152, 153, 154, 155, 156, 157, 158, 200, 235, 236, 237, 238, 240, 252, and those numbered from 159 to 198, both inclusive, each for the sum of one thousand dollars,
31 with all of the interest coupons appended thereto, being all of the coupons, excepting the first one, maturing after the date of said bonds; that he is also the owner and holder of other coupons than those attached to the bonds above described, and which were attached to the construction bonds of said Mississippi and Missouri Railroad Company, which are all past due and wholly upaid; that said coupons, so owned by him, the numbers of the coupons, and the number of the bonds from which they were detached, are as follows:

| Number of coupons owned. | Their number. | Number of the bonds from which they were detached. |
|---|---|---|
| 50 | 15 | 2658 to 2707, both inclusive. |
| 38 | 15 | 2908 " 2945 " " |
| 55 | 15 | 2946 " 3000 " " |
| 36 | 15 | 3001 " 3036 " " |
| 64 | 15 | 3037 " 3100 " " |
| 15 | 15 | 3101 " 3115 " " |
| 96 | 15 | 3116 " 3211 " " |
| 78 | 15 | 3212 " 3290 " " |
| 79 | 15 | 3291 " 3370 " " |
| 7 | 15 | 3371 " 3377 " " |
| 33 | 15 | 3378 " 3400 " " |
| 57 | 15 | 3401 " 3457 " " |

| | | | | | |
|---|---|---|---|---|---|
| 50 | 15 | 4051 | " | 4100 | " " |
| 50 | 15 | 4101 | " | 4150 | " " |
| 50 | 15 | 4151 | " | 4200 | " " |
| 50 | 15 | 4201 | " | 4250 | " " |
| 800 | | | | | |

That no part of said bonds and coupons have been paid; that neither he, nor any other person or corporation in his behalf, has ever made, assented, or agreed to the arrangement or agreement hereinbefore recited, for the payment of said bonds and coupons by the payment of a less sum than that due upon the face thereof, and that he is now entitled to be paid the full amount stipulated to be paid on the face of said bonds and matured coupons.

And your orator further shows that the following coupons, viz., one coupon detached from bond numbered 3397; fifty coupons detached from bonds numbered 4051 to 4100, both inclusive; fifty coupons detached from bonds numbered 4101 to 4150, both inclusive; fifty coupons detached from bonds numbered 4152 to 4200, both inclusive; fifty coupons detached from bonds numbered from 4201 to 4250, both inclusive, were, by mistake, not signed by the secretary of said railroad company; but your orator alleges that said coupons and each of them were attached to valid and duly executed construction bonds of said railroad company, of which Exhibit A of said consolidated bill is a copy; that the bonds from which said coupons were detached had been duly executed, and were at
32 the time said coupons were detached therefrom valid, unpaid, outstanding bonds of said railroad company; and that said coupons have not, neither has any part thereof, been paid.

And your orator realleges all of the allegations set out and contained in said consolidated bill, with the exception of those contained in the paragraphs first above mentioned; the purpose of this amendment being to incorporate in said bill the paragraphs last above set out in the place of those withdrawn from said bill.

And your orator repeats the prayer for relief set out in the original consolidated bill.

WITHROW & WRIGHT,
With SCAMMON, McCAGG & FULLER,
*Solicitors for John V. McCollum.*

33 *Exhibit D.*

UNITED STATES OF AMERICA, *District of Iowa, ss:*

At a term of the circuit court of the United States for the said district, begun and holden at Des Moines on the third Tuesday, it being the 19th day of October, A. D. 1869.—Present, Hon. J. M. Love, district judge.

MARK HOWARD AND OTHERS
*against*
THE CITY OF DAVENPORT AND OTHERS; } No. 69, chancery. Original bill.

and

FREDERICK A. FOSTER, JOHN V. McCOLLUM, J. Bardwell, and H S. McComb,
*against*
MARK HOWARD AND OTHERS, Complainants and defendants in said original bill. } Consolidated cross-bill.

This cause coming on to be heard at this term, to wit, on the eighth day of November, A. D. 1869, upon the consolidated bill of Frederick A. Foster, John V. McCollum, J. Bardwell, and H. S. McComb, and the amendment thereto of John V. McCollum, the answers thereto of Mark Howard, and original complainants in the original bill, John Webber, Joseph Young, Clark Durant, Charles W. Durant, Robert Mur-
34 ray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Margaret I. Nisbet, Joseph W. Clark, Volkert P. Douw, Christopher Y. Lansing, and Jared F. Harrison, intervening complainants in said above-entitled cause, and the Mississippi and Missouri Railroad Company, George W. Stanton, jr., John Elliott, and Blakely Wilson, and the Chicago, Rock Island and Pacific Railroad Company, defendants to said original bill in said cause, all of whom are defendants to said consolidated bill, and the replications of said complainants in said consolidated bill to said answers, and upon the motion of all of said defendants to said consolidated bill, except the Chicago, Rock Island and Pacific Railroad Company, for an order directing the receiver to distribute the fund now held by him in this cause according to the directions of the original decree herein; and thereupon the parties having appeared by their solicitors, and the court having inspected the record and heard the evidence and the arguments of counsel, and being fully advised in respect thereto, doth order, adjudge, and decree as follows, to wit:

That the complainant, John V. McCollum, is not entitled to the payment of any portion of the bonds and coupons in said consolidated bill and the amendment thereto described, or to any portion of the same, out of the funds now in the hands of the receiver in this cause; and that the said consolidated bill, as to the said John V. McCollum, be and is dismissed without prejudice to his rights to recover on said bonds and coupons against the defendant, the Chicago, Rock Island and Pacific Railroad Company, or other persons.

That the said Frederick A. Foster, J. Bardwell, and H. S. McComb are severally and respectively entitled to share in the said fund in the hands of the receiver, upon the basis and to the extent hereinafter provided, and no other, to wit: That they and each of them are entitled to pro rata shares or dividends of the said fund, or the proceeds thereof, on an equal footing with complainants and other creditors joining with them in the said original bill as provided by the said decree therein, to wit, as general creditors of the Mississippi and Missouri Railroad Com-
pany, and in proportion to the amounts which were due them
35 respectively upon the bonds, coupons, and scrip, as set forth in said cross-bill, at the date of the master's report in the said original cause, to wit, the first day of March A. D. 1868. That said amounts are to be ascertained in manner following, to wit:

As to the claim of said Frederick A. Foster, by adding to the principal sum of said bonds held by him, to wit, the sum of ten thousand dollars, the amount of the coupons thereon held by him and matured prior to July 9th, 1866, the date of said sale on foreclosure in said cross-bill mentioned, with interest on said coupons from the maturity thereof respectively, at seven per cent. per annum, down to the said 9th day of July, 1866, by then substracting from said aggregate amount the pro rata proportion of the proceeds of said foreclosure sale properly applicable to the payment of the said Foster's bonds, to wit, twenty per centum of the amount then due thereon; and by then adding to the remainder thus produced interest at the rate of seven per centum per annum

from the 9th day of July, A. D. 1866, to said first day of March, A. D. 1868.

That the amount so due to the said J. Bardwell on the said first day of March, 1868, is to be ascertained so far as the same grows out of the said first mortgage construction bonds and income bonds held by him as alleged in said cross-bill, in the same manner and by the same rule precisely as is hereinbefore provided in respect to the claim of said Frederick A. Foster, and so far as the same grows out of said second mortgage construction bond, held by him as alleged in said cross-bill, in the same manner and by the said rule as is hereinbefore provided in respect to his said other bonds, except that no deduction is to be made on account of said proceeds of said foreclosure sale, no part of said proceeds being applicable to said second mortgage construction bonds.

That the amount due to said H. S. McComb is to be ascertained in the same manner and by the same rule as hereinbefore provided in respect to said Frederick A. Foster, except that no deduction is to be made on account of proceeds of said foreclosure sale, no part thereof being applicable to said McComb's claim.

And it is further ordered, adjudged, and decreed that the re-
36 ceiver herein, from the funds now in his hands and held under the former decree in this cause, first pay and satisfy the costs of all the parties to the said consolidated bill, as well as the parties to the original bill, together with his own costs and charges in the execution of said original decree and of this decree, to be settled and allowed by the court or a judge thereof; that after the payment of said costs and charges he shall apportion the fund remaining in his hands among the said several original and intervening complainants and the said Frederick A. Foster, J. Bardwell, and H. S. McComb pro rata in proportion to the amounts of the said claims, as ascertained in the original decree herein and by this decree, including as to the claims of the parties to the original decree those matured and not matured, and which said amounts are as follows, to wit:

To Mark Howard, the sum of four thousand four hundred and four $\frac{22}{100}$ dollars, ($4,404 22.)

To John Webber, the sum of ten thousand and two $\frac{59}{100}$ dollars, ($10,002 59.)

To Joseph Young, the sum of five hundred and sixty-two thousand four hundred and twenty-eight $\frac{90}{100}$ dollars, ($562,428 90.)

To Clark Durant, the sum of thirty-six thousand five hundred and sixty $\frac{93}{100}$ dollars, ($36,560 93.)

To Charles W. Durant, the sum of twenty-four thousand one hundred and twenty-eight $\frac{14}{100}$ dollars, ($24,128 14.)

To Robert Murray, the sum of eleven thousand eight hundred and fifty-one $\frac{97}{100}$ dollars, ($11,851 97.)

To Henry Vanderveer, the sum of eight thousand six hundred and thirty-seven $\frac{42}{100}$ dollars, ($8,637 42.)

To William Elliott, the sum of eleven thousand two hundred and thirty-nine $\frac{70}{100}$ dollars, ($11,239 70.)

To George Bliss, the sum of thirty-eight thousand one hundred and sixty-six $\frac{04}{100}$ dollars, ($38,166 04.)

To Betsy Tracy, the sum of twenty-one thousand nine hundred and eighty-four and $\frac{06}{100}$ dollars, ($21,984 06.)

To Harriet Le Conte, the sum of twenty-one thousand three hundred and eighteen $\frac{75}{100}$ dollars, ($21,318 75.)

37 To Joseph W. Clark, the sum of twelve thousand and twenty $\frac{50}{100}$ dollars, ($12,720 50.)

To Volkert P. Douw and Christopher Y. Lansing, the sum of fifteen thousand seven hundred and ninety-four $\frac{08}{100}$ dollars, ($15,794 08.)

To Margaret I. Nisbet, the sum of eight thousand two hundred and seventy-two $\frac{60}{100}$ dollars, ($8,272 60.)

To Jared F. Harrison, the sum of fourteen thousand five hundred and twenty-two $\frac{48}{100}$ dollars, ($14,522 48.)

To Frederick A. Foster, the sum of nine thousand eight hundred and ninety-eight dollars, ($9,898.)

J. Bardwell, the sum of six thousand seven hundred and eighteen dollars, ($6,718.)

To H. S. McComb, the sum of nine hundred and ninety-three dollars, ($993.)

That from said fund so apportioned and set apart to each of said parties the said receiver shall first pay to said party, his representatives or assigns, in full, (so far as the fund so set apart to him will go,) the amount of his claim now matured and due, (the maturity of the claims of the original parties in said cause to be ascertained from the master's report herein,) together with any additional amount which shall have matured and become due at the time of such payment, in the following order, viz:

He shall first pay in full, or so far as such fund will go, any judgment or judgments of such party, if any; out of the remainder of such money, if any, he shall next pay in full, or so far as such money will go, any and all coupons which are due on the bonds held by such party; and out of the remainder of such moneys, if any, he shall next pay in full, or so far as such fund will go, the principal of any bond or bonds which are matured and due, and in case the amount of such matured bonds exceed the sum so applicable to their payment, then he shall pay in full such part of said bonds as said sum shall be sufficient to pay, and the remainder of the fund so apportioned and set apart to each of said parties shall in like manner be applied from time to time by said receiver to the payment of such party of the amounts which shall thereafter become due and remain unpaid for either interest or principal, on his or her
38 respective claims, as and when the same shall fall due; and said receiver shall apply the said remainder of said sum so set apart and appropriated to any of said parties who shall consent to receive the same in payment and satisfaction, so far as the same will go, of the principal sum or sums secured to be paid by guaranteed bonds held by them respectively though not yet matured, they rebating all future interest thereon to the extent of such payments; that before such payments are made each of said parties shall produce and deliver to the receiver a written statement, certified by the clerk of the court to be correct, of the parties, date, and amount of each judgment of which he claims payment; and shall also produce and deliver to the receiver all coupons and bonds which are due and which may be paid in full, together with a receipt for such payment, and shall deliver to him a receipt stating the amount which is paid on any judgment, bond, or coupon which may be paid only in part, describing the same so that it may be identified; and in case of partial payment, when made, the receiver shall indorse upon the bond a statement of the amount so paid by him, and that the same was paid from funds in his hands as receiver, and all bonds and coupons shall be produced to him for such indorsement before such payment shall be made thereon, and the receiver shall file with the clerk of the court in which the judgment so paid in part is entered, a statement of the amount so paid thereon, and that the same was paid from

funds in his hands as receiver, which statement shall by said clerk be filed and preserved among the papers in the cause.

And it is further adjudged and decreed that after the said distribution the receiver shall proceed to collect from the principal debtors in said judgments on guaranteed bonds and coupons, and such bonds and coupons not in judgment, as shall have been delivered to him in accordance with the provisions of this decree, the full amount of such debt as against such principals and each of them, and shall at each term of this court report to the court the amount of moneys in his hands so collected, and shall hold the same subject to further distribution, under the order of the court, to the creditors of the Mississippi and Missouri Railroad Company, and of the surplus thereof, if any remain after the payment of the creditors, to the stockholders of said Mississippi and Missouri Railroad Company.

39 And it is further ordered, adjudged, and decreed that the shareholders of the Mississippi and Missouri Railroad Company who would be entitled to the distribution of said fund according to the agreement of November first, 1865, and subsequent agreements between the stockholders and bondholders of the Mississippi and Missouri Railroad Company and the said Stanton, Elliott, and Wilson, and who would have been entitled to said fund but for the claims of the creditors of the Mississippi and Missouri Railroad Company be, and they are hereby, subrogated, subject to the foregoing provisions of this decree, to all the rights, claims, and remedies of the parties plaintiff respectively, in and upon each and all of said judgments, coupons, and bonds, as and when the same shall be so paid in full against the municipal corporations which are the principal debtors on such bonds and judgments; that such judgments shall remain in full force and effect against such corporations for the benefit of said shareholders, who may enforce the collection of the same in the name of the plaintiffs therein or otherwise, but at their own costs and charges, by any process, remedy, or proceeding which said plaintiffs might have had for their own benefit; that any and all proceedings which might have been instituted by any of said parties for the collection of said demands shall remain and enure to the benefit of the receiver herein for the use of the parties entitled to this fund, and to this end the original and intervening complaints respectively, on the payment of such judgments by the receiver, shall execute, acknowledge, and deliver to him an assignment of each judgment so paid, and the receiver shall, on the payment of the several demands herein ordered to be paid to the complainants and intervenors, and the said Foster, Bardwell, and McComb, deliver under the order of the court to said shareholders, or to their lawfully constituted and authorized trustees or agents, such assignments of said judgments. and shall also deliver to them all coupons and bonds which shall have been paid in full as above directed.

And it is further ordered, adjudged, and decreed that if after payment in full to any of said parties by said receiver, of all sums which said party shall be entitled to have paid him out of said funds according to the directions hereinbefore given, there shall remain in said receiv-

40 er's hands any portion or residue of the proportion of said funds set apart and apportioned to said party as hereinbefore directed, the same shall be reported by said receiver to the court and held subject to such further order and direction as may be made by the court in respect to the disposition thereof.

It is ordered, adjudged, and decreed that the receiver do proceed to distribute, according to the terms of this decree, the funds now in his

hands as follows: He shall, as soon as practicable, notify each of the parties entitled to share in the distribution of said fund of the amount of his or her dividend of the same, and of the amount of money in his hands applicable to the payment of the same; the party entitled thereto may elect to take payment of the balance thereof in the bonds of the Chicago, Rock Island and Pacific Railroad Company, constituting a portion of the fund in the hands of the receiver, at the current market price of said bonds at the stock exchange in the city of New York, on a day to be fixed by the receiver, with the approval of a judge of this court, and with reference to the best interest of all the parties concerned; and if there shall not be sufficient money in the hands of the receiver to pay all of said dividends and all the parties entitled thereto shall not elect to receive bonds for the balance as above provided, the receiver shall proceed to realize the sum necessary to pay said dividend by converting enough of said bonds held by him into money, by the sale thereof at public sale, at the stock exchange in the city of New York, at not less than the current market price of said bonds at said stock exchange, at such time as said receiver may think proper for the best interests of the parties concerned; but before any such sale the said receiver must first notify the parties, their agents, or attorneys, of the time of such sales, and the amount to be put in the market at any one time, and shall also give five days' public notice of said sale in a daily paper published in the city of New York.

Provided, that no repetition herein contained of the matters adjudicated in the said original decree shall be taken or construed as a re-adjudication thereof as between the parties to said original decree; which said decree is to be regarded as continuing in full force and virtue, except so far as modified hereby so as to provide for the payment of the claims of said Foster, Bardwell, and McComb equally with
41 the original complainants and intervenors, and all the full amount of their respective claims as hereinbefore provided.

And thereupon the complainants in said consolidated bill, John V. McCollum, Frederick A. Foster, J. Bardwell, and H. S. McComb, and the defendant, the Chicago, Rock Island and Pacific Railroad Company, by their several solicitors, each pray an appeal from this decree to the Supreme Court of the United States, and it is allowed them, or either or any of them, on their giving bonds with sureties in the penal sum of five hundred dollars, as provided by law, for the costs of the appeal; provided that in order to supercede and stay execution of said decree pending such appeal, one or more of the appellants shall give bond with sureties, conditioned and to be approved as provided by law, in the penal sum of seven hundred thousand dollars.

And the said Mark Howard, John Webber, Joseph Young, Clark Durant, Charles W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet Le Conte, Joseph W. Clark, Volkert P. Douw, Christopher Y. Lansing, Margaret I. Nisbet, and Jared F. Harrison pray an appeal to the Supreme Court of the United States from so much of said decree as awards any part of the fund in controversy to said Frederick A. Foster, J. Bardwell, and H. S. McComb, and it is allowed them on their giving bond, as provided by law, in the sum of five hundred dollars.

And the said George W. Stanton, jr., John Elliott, and Blakely Wilson pray an appeal from so much of said decree as awards any part of said fund to said Foster, Bardwell, and McComb, and also from so much of said decree as provides that the said receiver shall proceed tc collect the bonds, coupons, and judgments which are to be delivered or assigned to

him by the complainants and intervening creditors, and hold the same subject to such further distribution, under the order of the court, to the creditors of the Mississippi and Missouri Railroad Company, and their appeal is allowed on their giving bond, as provided by law, in the penal sum of five hundred dollars.

J. M. LOVE, *Judge.*

42 *Motion & petition for mandamus.*

Supreme Court United States.—December term, 1869.

No. 11, ORIGINAL.—EX PARTE MARK HOWARD & AL., PETITIONERS.

*Order of court.*

This cause came on to be heard on the motion and petition for mandamus, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that an alternative writ of mandamus issue from this court, directed to the judges of the circuit court of the United States for the district of Iowa, returnable on the first Monday in February next.

43 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Iowa, greeting:

Whereas lately, in the Supreme Court of the United States, Mark Howard et al., by their counsel, filed their certain petition for a writ of peremptory mandamus, to be directed to the judges of the circuit court of the United States for the district of Iowa, requiring and commanding the judges of the said circuit court to forthwith execute the decree of the said circuit court in the cause of Mark Howard et al. against the City of Davenport et al., rendered at the May term, 1868, of said circuit court, and affirmed by the Supreme Court of the United States at its December term, 1868, or to execute the said decree by distributing all the funds ordered to be distributed among the plaintiffs, except sufficient to cover the claims of Foster et al., at the May term, 1869.

And said petition coming on to be heard before said Supreme Court, was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that a writ of mandamus issue from this court, directed to the judges of the circuit court of the United States for the district of Iowa, returnable on the first Monday of February next, requiring and commanding them to proceed with the execution of the decree of the said circuit court referred to in said petition.

You therefore are hereby commanded and enjoined that immediately after the receipt of this writ, and without delay, you do proceed with the execution of the decree of that court, rendered at the May term, 1868, so that complaint be not again made in the premises; or that you appear before the Supreme Court of the United States, to be held at Washington City, on the first Monday of February next, to show cause why you refuse to do so. Hereof fail not at your peril, and have you then and there this writ.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this 20th day of December, 1869.

Issued January 12th, 1870.

D. W. MIDDLETON,
*Clerk Supreme Court U. S.*

44 OTTUMWA, *Jan'y 17th*, 1870.

DISTRICT OF IOWA:

I hereby acknowledge service of the foregoing writ.

J. M. LOVE.

I acknowledge service of this writ on this 21st day of January, A. D. 1870.

SAM. A. MILLER,
*Judge U. S. Circuit Court for District of Iowa,*

(Indorsed:) Supreme Court, U. S. 1869, Dec. term. Original. No. 11. Ex parte Howard & al., petitioners. Alternative writ of mandamus & service.

Filed 21 January, 1870.

45 *Order of court.*

Supreme Court of the United States.—December term, 1869.

No. 11, ORIGINAL.—EX PARTE MARK HOWARD & AL., PETITIONERS.

On the motion of Mr. Grant, of counsel for the petitioner, it is ordered by the court that leave be granted him to amend the alternative writ of mandamus issued in this cause.

46 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States to the honorable the judges of the circuit court of the United States for the district of Iowa, greeting:

Whereas Mark Howard, John Weber, Joseph Young, Clark Durant, Chas. W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey Tracy, Harriet L. Conte, Joseph W. Clark, Volkert P. Dow, Christopher Y. Lansing, Margaret S. Nesbit, and Jared F. Harrison, George W. Stanton, jr., J. Elliott, Blakely Wilson, and the Mississippi and Missouri Railroad Company, by Grant, their attorney, have given this court to be informed that on the 9th day of July, 1866, the said Mark Howard and John Weber filed their bill in equity, in the circuit court of the United States for the district of Iowa, alleging that they had severally recovered judgments against the City of Davenport, and the Mississippi and Missouri Railroad Company, for the sums of $4,404 10, and $10,002 59, for interest on certain bonds executed by the city of Davenport, to aid in the construction of the Mississippi and Missouri railroad; which bonds were guaranteed by the Mississippi and Missouri Railroad Company, and suit was commenced against the City of Davenport, the Mississippi and Missouri Railroad Company, George W. Stanton, jr., John Elliott and Blakely Wilson, the Chicago and Rock Island, and the Chicago, Rock Island and Pacific Railroad Company; and afterwards such proceedings were had that Joseph Young, Clark Durant, Chas. W. Durant, Robert Murray, Henry Vanderveer, William Elliott, George Bliss, Betsey D. Tracy, Harriet L. Conte, Joseph Clark,
47 Volkert P. Dow, Margaret S. Nesbit, and Jared F. Harrison, holders and claimants of certain other bonds, executed by Scott County, Muscatine City and County, Johnson County, and Iowa City, which were guaranteed by said Mississippi and Missouri Railroad

Company, were allowed to, and did, join with said Howard and Weber in the prosecution of said suit. And the said plaintiffs alleged in substance, that at a meeting of the stock and bondholders of the Mississippi and Missouri Railroad Company, held in New York on the 20th of October, 1865, it was resolved to sell the Mississippi and Missouri railroad, its franchises, and all its real and personal property, to the Chicago and Rock Island Railroad Company, for the sum of five and a half millions of dollars, provided the same was distributed among the mortgage bondholders and stockholders of said Mississippi and Missouri Railroad Company according to the following scale:

| | |
|---|---|
| 1st mortgage, eastern divis., par & interest to 1st July, 1865 | $1,256,490 |
| 2d mortgage, " $400,000, at 80 | 320,000 |
| Oskaloosa division, 665,939, at 62½ | 416,212 |
| Land grant division bonds, 3,878,550, at 70 | 2,710,635 |
| 2d construction mortgage bonds, 693,764, at 30 | 208,129 |
| Capital stock, 3,452,500, at 16 | 552,400 |
| Expenses, foreclosure | 32,194 |
| | $5,500,000 |

And George W. Stanton, jr., John Elliott, and Blakely Wilson were appointed a committee or trustees for the stock and bondholders, to arrange the terms and manner of sale, and select some trust company to receive the bonds and stock of the assenting parties, and give them certificates of what they were entitled to receive. That on the 1st of November, 1865, the said Mississippi and Missouri Railroad Company and the Chicago and Rock Island Railroad Company entered into a contract in writing to carry out the sale of the former company's road according to the resolutions of the 20th of October, 1865, to the Chicago and Rock Island Railroad Company, by which agreement the Mississippi and Missouri Railroad corporation were to cause the outstanding mortgages on its property to be foreclosed, and the said property to be sold under the foreclosure decree so as to convey a clear title to
48 such corporation in Iowa, as the Chicago and Rock Island Railroad Company might designate, and the five and a half millions purchase-money were to be paid in bonds of said company, guaranteed by the Chicago and Rock Island Railroad Company, or a consolidated company made of the two. That the mortgages were foreclosed and a decree rendered in May, 1866, and the whole property was sold, under said decree, in separate parcels, on 9th July, 1866, to the Chicago, Rock Island and Pacific Railroad Company, for sums amounting in the aggregate to $2,100,000, and said company was consolidated with the Chicago and Rock Island railroad, and proceeded to execute said contract of 1st November, 1865. The plaintiffs, Howard et als., claimed that the said Mississippi and Missouri Railroad Company were insolvent, and before the sum of $552,000, set apart by the terms of the sale, could be divided among the stockholders, it should be divided among them, Howard and others, as holders of the said guaranteed bonds and judgments thereon. The said Mississippi and Missouri Railroad Company, and the trustees of the stock and bondholders, who assented to said sale, Stanton, Elliott, and Wilson, the Chicago and Rock Island railroad, and the Chicago, Rock Island and Pacific railroad, the new company created in Iowa, and consolidated with the Chicago and Rock Island railroad, were made parties defendant. The trustees, Stanton, Elliott, and Wilson, answered and made defence. The Chicago, Rock Island and Paci-

fic Railroad Company answered, alleging that they had become agents to distribute the fund, and made no defence, and demanded to be protected by the decree of the court. Such proceedings were afterwards had, that at the May term, 1868, of the said circuit court, a decree was rendered, that said plaintiffs were general creditors of said Mississippi and Missouri Railroad Company, and their claims, amounting to $832,032 38, were to be paid pro rata out of the $532,000, which was to be divided among the assenting stockholders, and the stockholders or their agents were subrogated to the creditors' rights on the guaranteed bonds. From this decree an appeal was taken by defendants and duly prosecuted in this court at the December term, 1868, and the de-
49 cree of the said circuit court was affirmed, and a mandate issued from this court to the Iowa circuit court commanding the said court to execute said decree so affirmed, all of which, by reference to the record and proceedings of this court in the said cause, number 319, of the said December term, 1868, will more fully appear. And the said relators gave this court further to understand and be informed, that pending said appeal to this court, and prior to the determination thereof, and the fund in controversy having been paid over to the receiver, in said decree mentioned in pursuance of said decree, and being in his hands, as appears by his report, on file in the cause, at the October term, 1868, of said circuit court, one Frederic A. Foster filed his petition in said court, entitled in the said cause, claiming to be the holder of certain of the bonds of the said Mississippi and Missouri Railroad Company to the amount of $10,000 and accrued interest, being part of the bonds secured by the first mortgage on the western division of the railroad of said company; and certain lands granted to it in aid of its construction, commonly known as "1st mortgage land grant bonds," which bonds had not assented to the said contract or agreement for the sale of the railroad as aforesaid, and claiming to be entitled to a lien on the said fund superior to the said Howard and others, complainants, and to have the said bonds paid in full out of said fund, in preference to said complainants. That afterwards, to wit, at the May term, 1869, of said circuit court, said appeal having been determined, and the mandate from this court filed in said circuit court, and the complainants having moved said court to carry the decree into execution, certain other parties, to wit, John V. McCollum, J. Bardwell, and H. S. McComb, appealed for leave to file their several petitions therein; also, claiming severally, to be holders of certain unassented mortgage bonds of the said Mississippi and Missouri Railroad Company, and to be entitled to have the same paid out of the said fund, prior and paramount to any payment to the complainants, as directed by said decree. And thereupon at the said term last mentioned, an order was made by the said circuit court, of which a certified copy is annexed to said information, marked
50 "A," and made part thereof. That thereupon at the same term, said Foster, McCollum, Bardwell, and McComb prayed an appeal to this court from so much of said order as denied their petition for a suspension of the distribution of the whole of said fund, and as directed distribution of a part thereof; which appeal, together with the supersedeas thereon, of any distribution of said fund, was by the said court allowed, against the objection and remonstrance of said complainants, and said order of the May term, 1869, so far as it directs distribution to be made, remains in consequence wholly unexecuted. That afterwards, to wit, on the last July rule day of said circuit court, said Foster, McCollum, Bardwell, and McComb filed their consolidated cross-bill in pursuance of said order. That relators answered said cross-bill, and the

same was heard at the October term, 1869, and a decree made dismissing said bill as to McCollum, adjudging that said Foster, Bardwell, and McComb were entitled to share in the fund pro rata, on the same footing and equally with the original claimants, to wit, as general creditors of the Mississippi and Missouri Railroad Company and not otherwise, and ascertaining the amount due to them respectively, and on which dividends should be made to them pari passu with the original complainants, as follows, to wit:

| | |
|---|---|
| To said Foster the sum of | $9,898 00 |
| To said Bardwell the sum of | 6,718 00 |
| To said McComb the sum of | 993 00 |

And so far modifying the original decree as to let in said parties to participate in the benefit thereof to said extent, and no further. A copy of said decree marked "D" is annexed to said notice, and made part thereof. That said Foster, Bardwell, McCollum, and McComb thereupon appealed from said decree to this court, and obtained a supersedeas thereon. That afterwards, to wit, at the said October term, your relators moved the said circuit court for a rule or order on the receiver in said cause, to proceed, notwithstanding an appeal of said Foster and others, to make distribution of the fund in his hands under the original decree, or of so much thereof as was ordered by the court by the said order of the May term, 1869, to be distributed, which
51 motion was by the said court overruled. That by reason of said actings and doings of said circuit court, subsequent to the rendition of the original decree, affirmed by this court, relators have hitherto been and are still deprived of all benefit from said decree and prevented from enforceing the same, or obtaining payment of their said claims thereunder. That said actings and doings of the circuit court are, as relators are advised and believe, wholly contrary to, and unwarranted by, law or equity. That relators have no remedy therefor except a writ of mandamus from this court to be directed to the judges of said circuit court, commanding them to proceed to excute said decree.

52 Now, we being willing that full and speedy justice should be done in the premises, do command you, that you and each of you, proceed forthwith, notwithstanding said proceedings, subsequent to said original decree, to execute the said original decree in the case of Howard and others vs. the City of Davenport and others, in manner & form as therein decreed and affirmed by our said Supreme Court, by causing the said bonds and money, and the proceeds of said bonds therein referred to, to be delivered to said plaintiffs in manner & form as in said affirmed decree adjudged, the costs to be paid as in said decree ordered, and that you cause to be delivered to the lawfully constituted and authorized trustees or agents of the shareholders of the Mississippi and Missouri Railroad Company the judgments, coupons, and bonds to which they are subrogated by said decree in manner and form as
53 therein provided, or that you appear before our Supreme Court of the United States, now in session at Washington, on the first Monday in February, A. D. 1870, and show cause why you refuse so to do.

Witness the honorable Salmon P. Chase, Chief Justice of our said Supreme Court, and the seal thereof, this the 20th day of December, A. D. 1869.

(S'g'd) D. W. MIDDLETON,
*Clerk Supreme Court U. S.*

54 Supreme Court of the United States.—December term, 1869.

No. 11.—Ex parte Mark Howard & others.

Now come the relators by Grant, their attorney, and say they ought not to be barred of the relief sought by reason of anything alleged in the said return of the judges to the alternative writ, because the allegations of said return show no cause why the relators should not have the relief prayed for.

And for further cause of demurrer the relator say that it appears from the records referred to, and made part of said return, that the court below after final decree, and at a subsequent term, and after the judgment below was affirmed in this court, allowed McCollum & others to intervene in said cause, and make new pleadings & new issues, and at their request modified the affirmed decree.

55 And for further cause that, by the said return and records referred to, it appeared that said Foster and others had no specific lein or specific claim on the fund previously adjudged to the relators who were plaintiffs in the cause affirmed, and did not show any case which would authorize the court to suspend the affirmed decree, and modify it.

And for further cause, that it appears from said records & return that the court below, after mandate from this court, suspended & modified the affirmed decree, which, by affirmance, was the decree of this court, and over which the court below had no control.

And for further cause, it appears by said records & return that the court below, after the mandate from this court to execute the affirmed decree without a petition or motion, or showing of any kind, altered and modified the original decree, which subrogated Foster and others, trustees of the stockholders of Miss. & Mo. R. R. Co., to the guaranteed bonds which were by said decree paid out of the stockholders'

56 fund, in their posession, and the distribution of which was arrested by said affirmed decree.

And for further cause, it appears from said records and return, that the court below, after affirmance by this court of the decree in favor of general creditors, allowed other general creditors who were not parties to the original suit to intervene and divide a fund decreed to the first plaintiffs by this court, without any order from the appellate court.

Wherefore, by reason of the insufficiency of said return, the relators prayed judgment that said alternative writ may be made peremptory and for costs.

GRANT, *for Relators.*

(Indorsed:) 11. Ex parte Mark Howard & others. Demurrer to return.